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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE, AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

**BRIEF FOR CONCORD CONTROL, INC.
AS AMICUS CURIAE**

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This brief is being filed on behalf of Concord Control, Inc. as *amicus curiae* with the consent of all parties. Pursuant to Rule 42, the written consent of counsel for each party has been lodged with the Clerk.

INTEREST OF THE AMICUS CURIAE

Concord Control, Inc., *amicus* herein, a Massachusetts corporation, is the appellee in three consolidated cases now pending in the United States Court of Appeals for the Sixth Circuit as Nos. 78-3252, 78-3253 and 78-3254. Those appeals have been fully briefed and are awaiting oral argument in the Sixth Circuit.

Like petitioner Nachman Corporation, *amicus* has been confronted with an attempt by the Pension Benefit Guaranty Corporation ("PBGC") to expand its legislatively-created authority by engaging in an excessive, incorrect and unconstitutional application of its enabling statute. The PBGC has taken the position that it will guarantee payment of certain benefits to employees under a pension plan previously funded by *amicus*. If successful, the PBGC will seek under 29 U.S.C. §1362 to impose ultimate liability for these benefits on Concord Control in an amount which the PBGC calculates at approximately $761,000.

Concord Control's plan, like the Nachman plan, was terminated April 1, 1975, before the effective date of any of the minimum funding and vesting provisions of Titles I and II of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq*. It had been created pursuant to separate collective bargaining and pension agreements between Concord Control and a local of the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") to provide a means for funding retirement and disability benefits for members of the local union. The plan was administered by a Board of Administration which was directed to take certain actions (including changing the benefit levels), but the pension agreement contained no authorization for the Board to require additional employer contributions and required only that Concord Control make defined contributions to the plan on the basis of a certain amount of cents-per-hour-worked by each employee.

Each provision of the Concord Control pension agreement describing the potential benefits available under the plan contained a comparable limitation. The provisions dealing with retirement benefits, lump sum benefits, death benefits, and survivors' benefits each stated that the benefit was payable only "to the extent that funds are available under the Plan." The provisions regulating the distribution of assets upon termination likewise limited the employer's liability to the cents-per-hour-worked contributions, and the employees' rights to benefits were limited to those payable "to the extent of assets in the Retirement Fund." As noted, the Concord Control pension plan was terminated in 1975, prior to the effective date of the vesting and funding provisions of ERISA.

The judicial proceedings began when *amicus* filed a complaint for a declaratory judgment in the United States District Court for the Southern District of Ohio alleging, *inter alia*, that its plan's benefits were not guaranteed under the plan termination insurance program of Title IV of ERISA. The PBGC responded by applying for an order terminating *amicus*' plan under 29 U.S.C. § 1342. Those actions were consolidated, and the UAW intervened. In its unpublished opinion, findings of fact, conclusions of law and judgment, the district court ruled that the plan did not provide for employer contributions after September 1, 1974, and that it therefore was excluded from Title IV by virtue of 29 U.S.C. § 1321(b)(5).[1] The PBGC and the UAW have

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[1] *Amicus* is in a peculiar situation in that its pension contribution obligations ceased before the termination of the Plan in April 1975 and, indeed, before the enactment of ERISA in September 1974. Both the collective bargaining agreement and the pension agreement between Concord Control and the UAW local expired in August

appealed to the Sixth Circuit. The issue on which certiorari was granted in this case was briefed to the district court and has been advanced by Concord Control on appeal as an alternative basis for affirmance of the district court's judgment. *See United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Thus the issue raised in the instant case is squarely applicable to *amicus*, and its disposition will vitally affect the appeal now pending in the Sixth Circuit.

1974 by reason of notices sent by the local union. No subsequent collective bargaining agreement or pension agreement has ever been adopted. In fact, on August 8, 1974, the UAW called and conducted an economic strike against Concord Control. That strike has never been resolved. Since the pension agreement obligated *amicus* to make payments to the Plan trustee only for "each hour worked for the Company" by each employee on the seniority list of the company "as defined in the collective bargaining agreement then in effect," the expiration of the collective bargaining agreement and pension agreement means that Concord Control has not made any contribution to the plan for hours worked by anyone since before the enactment of ERISA. The separate legal issues posed by these distinctive facts are not before the Court, but they do reveal the extent to which the PBGC has sought to assert its authority in a retroactive manner.

SUMMARY OF ARGUMENT

When Congress undertook the sizable task of reforming the American system of pension regulation, it recognized that some of the most significant features of the new law had to be phased in gradually in order to avoid substantial economic hardship for many employers. Accordingly, the resultant ERISA law, though initially effective in part in September 1974, did not impose mandatory funding and vesting requirements until plan years beginning in 1976. In and after 1976, pension plans were, for the most part, required to protect the plan's beneficiaries from forfeiture of vested benefits. Prior to that time, however, existing plans which provided that benefits would be limited to the amount of funds contributed at the time of termination (and which thus permitted "forfeiture" of the unfunded balance of possible benefits) were not only legally sufficient but also qualified for favorable federal income tax treatment as "qualified plans."

Congress, by creating the PBGC, intended to guarantee the actual receipt by plan participants of certain anticipated benefits under the terms of their respective plans. But the PBGC was given only a specific, limited charter. Under the terms of 29 U.S.C. § 1322(a), the PBGC has the power only to guarantee "the payment of all *nonforfeitable* benefits . . . under the terms of a plan . . ."[2] The term "nonforfeitable" is defined in 29 U.S.C. § 1002(19) to describe a benefit:

> ". . . which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

The Nachman plan was lawfully terminated in 1975—prior to the effective date of the mandatory vesting and funding pro-

[2] Emphasis ours here and throughout this brief except where otherwise indicated.

visions of ERISA. Hence, it was permitted to provide for forfeitable benefits, and it did so in the bargained-for stipulation that benefits paid upon termination of the plan would be limited to the assets of the fund then on hand. Participants' claims to the unfunded portion of the anticipated benefits were thus neither unconditional nor enforceable against the plan except to the extent of assets available. There is no contention that there was anything amiss about the administration or termination of the Nachman plan or the method by which it had been funded during its existence.

Nevertheless, despite the perfectly valid pre-1976 forfeiture provision in the Nachman plan and the fact that Congress has limited the PBGC's role to that of guaranteeing "nonforfeitable" benefits as provided by the governing plan, the PBGC asserted jurisdiction over the Nachman plan, sought to guarantee benefits in excess of those agreed to in the plan, and expressed its intention to impose ultimate liability against Nachman under principles of subrogation. The PBGC relied primarily on its own administrative definition of "nonforfeitable," which is completely incompatible with the Congressional definition in § 1002(19). The Seventh Circuit blessed the PBGC's endeavors, relying on an equally strained concept of "nonforfeitability."

The PBGC's effort to subject the Nachman plan to its jurisdiction should be rejected because: (a) it flies in the face of the clear statutory language and seeks radically to expand the authority granted to the PBGC by Congress; (b) it attempts to override the Congressionally ordained gradual phase-in of mandatory funding and vesting; (c) it negates the jurisdiction of the Treasury Department and the Department of Labor over funding and vesting; and (d) it is totally devoid of legal authorization.

ARGUMENT

I. The PBGC's Attempt to Guarantee Benefits Beyond the Value of the Nachman Plan's Assets Is Inconsistent With the Language of Section 1322(a).

Section 1322(a) specifically confines the PBGC's authority as a guarantor to "*nonforfeitable benefits . . . under the terms of a plan* . . ." Both of the emphasized phrases impose crucial limitations on the scope of § 1322(a). Each provision evinces a deliberate Congressional choice not to equate the scope of the immediately effective Title IV of ERISA with that of the phased-in Titles I and II.

The starting point for interpreting § 1322(a) is, of course, the statutory language itself. *International Brotherhood of Teamsters v. Daniel*, — U.S. —, 47 U.S.L.W. 4135, 4136 (Jan. 16, 1979); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977). In this case, two subsidiary rules for interpreting that language are also implicated: (1) Congress is assumed to have used words in their ordinary meaning, *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459, 465 (1968); *Richards v. United States*, 369 U.S. 1, 9 (1962); *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947); and (2) the same word is presumed to have the same meaning throughout a statute. *E.g.*, *Hotel Equities Corp. v. Commissioner*, 546 F.2d 725, 728 (7th Cir. 1976); *Commissioner v. Ridgeway's Estate*, 291 F.2d 257 (3d Cir. 1961); *cf. Director, Office of Workers' Compensation Programs v. Rasmussen*, — U.S. —, 47 U.S.L.W. 4159, 4162 (Feb. 21, 1979). If the literal meaning of the statute is plain, the Court's sole function is to enforce its terms. *Flora v. United States*, 357 U.S. 63, 65 (1968); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).[3]

In addition to these universal maxims, certain more specialized canons of construction govern this case. Although the Court did not grant certiorari on the constitutional issue raised by Nachman, the presence of a substantial constitutional question necessarily affects consideration of the statutory issue. We respectfully suggest that this Court is obligated under these circumstances to interpret the statute to avoid the constitutional issue if at all possible. *E.g., Califano v. Yamasaki*, — U.S. —, 47 U.S.L.W. 4765, 4768 (June 20, 1979); *Pernell v. Southall Realty*, 416 U.S. 363, 365 (1974); *Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962).

Furthermore, since the constitutional infirmity arises from the suggested retroactive impact of the statute and the resultant imposition of additional liability to former employees,[4] the

[3] It is unlikely that Congress intended to abrogate these long-held tenets of construction by its enactment of ERISA. Hence, we are mystified by the Seventh Circuit's castigation of the district court for resorting to rules of "ordinary English speech" instead of employing as yet undefined and esoteric principles of "technical pension English." *See* 592 F.2d at 953.

Indeed, the Court of Appeals appears to have ignored the wise counsel of *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), where the Court invalidated an administrative regulation promulgated under a narrowly circumscribed grant of authority. Mr. Justice Frankfurter's words speak directly to the Seventh Circuit's error:

> "For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the [statute] is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it." *Id.* at 617-18.

Here, as in *Addison*, the mere fact that a statute deals with the potentially technical areas of labor relations and taxation does not signal the necessary "hint" that Congress used words such as "nonforfeitable" and "unconditional" "in any but an ordinary sense." *See also NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 324-25 (1951); *Rosenman v. United States*, 323 U.S. 658, 661 (1945).

[4] *See Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Court should also be guided by the rubric of *Greene v. United States*, 376 U.S. 149, 160 (1964), that:

> "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' "

Indeed, the Court has already indicated that this maxim is entitled to great weight in dealing with ERISA by its observation in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978), that "rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result."

Having identified the ground rules of statutory construction, we turn now to the provisions in question.

A. The Nachman Plan Does Not Provide "Nonforfeitable" Benefits.

Congress pointedly limited the guarantor role of the PBGC to benefits that are "nonforfeitable." This term is defined by 29 U.S.C. § 1002 (19):

> "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional, and which is legally enforceable against the plan.*"

All precepts of statutory interpretation conjoin to prove convincingly that the Seventh Circuit misconstrued this definition and misapplied it to the Nachman plan.

A straightforward and common sense approach to the statutory language demonstrates that the Nachman plan does not provide "nonforfeitable" benefits. Under the Nachman and Concord Control pension plans, *both the anticipated benefits and the employees' rights or claims to those benefits were totally conditional* on the amount of funds in the plan.

There was no legally enforceable claim, right or benefit beyond the claim, right or benefit payable from the funds on hand, and no employee could obtain a judgment for more than his pro rata share of those assets. *See Cowles v. Morris & Co.*, 330 Ill. 11, 161 N.E. 150, 154-55 (1928). Neither benefits nor claims to benefits beyond the value of the assets in the trust fund were legally enforceable against the Nachman plan because the plan (a) limited an employee's right or claim (through the third sentence of Article V, Section 3 and through Article X, Section 3), and (b) limited the employer's liability (through the fourth sentence of Article V, Section 3). In short, the plan could not lawfully pay benefits in excess of the amount of the underlying funds, and the employer was not obligated to fund the plan beyond its cents-per-hour-worked contractual obligations.

Although the definition of "nonforfeitable" in §1002(19) appears in Title I of ERISA, it is equally applicable to Title IV. The well-established presumption that the same word has the same meaning throughout a single statute may be displaced only by some clear or affirmative indication that a different construction was intended. *E.g., Schooler v. United States*, 231 F.2d 560, 563 (8th Cir. 1956); *Sampsell v. Straub*, 194 F.2d 228, 230 (9th Cir. 1951), *cert. denied*, 343 U.S. 927 (1952). There is no indication anywhere that "nonforfeitable" in §1322 (a) should be accorded a different meaning for purposes of that section that it has in Title I. The failure to make the statutory definition of "nonforfeitable" explicitly applicable to § 1322(a) does not reflect any Congressional intent to ascribe

a different meaning to the term in that section. *Caolo v. Dulles*, 115 F.Supp. 125 (D. P. R. 1953). Indeed, both the vesting and minimum funding provisions of Title I, to which the statutory definition expressly pertains, and the plan termination insurance provisions of Title IV implement the legislative purpose stated in 29 U.S.C. §1001(c). Accordingly, there is a compelling reason to apply the same definition uniformly throughout the statute. *See Folker v. Johnson*, 230 F.2d 906 (2d Cir. 1956).

Even the Seventh Circuit in *Nachman* rejected the PBGC's effort to confine the statutory definition to Title I. That Court said: "We agree with the district court that the definition of 'nonforfeitable' provided in Title I should govern the construction of that term's use in Title IV." 592 F.2d at 952. The Court then went astray, however, by (a) disregarding the provisions of the Nachman plan that limited the enforceability of benefits (or claims) against the plan, and (b) misinterpreting the statutory definition as permitting benefits (or claims) to be regarded as "unconditional" merely because the employee had satisfied certain conditions.

The Seventh Circuit initially erred by characterizing the Nachman plan as solely involving an exculpatory clause limiting *employer* liability, as contrasted (by the Court) with the liability of the plan. The Court of Appeals thus simply disregarded both that portion of Article V of the Nachman plan which expressly states, "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund," and the provisions of Article X, Section 3 for pro-rating of benefits upon termination. The Nachman plan (like the Concord Control plan) thus stipulates that benefits are no more "legally enforceable" against the plan than they are against the employer. The Court of Appeals' proffered distinction was therefore without basis in either law or fact.

The PBGC's theory—adopted by the Seventh Circuit—that benefits (or claims) are "unconditional" if the participant has satisfied all of the conditions precedent to "vesting" is inconsistent with: (a) The ordinary meaning of the term "unconditional"; (b) the Congressional rejection of this approach to the term "nonforfeitable"; (c) the prior Congressional and Treasury Department use of "nonforfeitable"; (d) the statutory structure of Title I; (e) the grammar and syntax of §1002(19); and (f) the Treasury Department's current interpretation of "nonforfeitable." Inasmuch as the Nachman brief thoroughly treats the first three points, we will confine ourselves to the last three.[5]

The approach of the Court of Appeals cannot be reconciled with 29 U.S.C. §1053(a)(3). If benefits were "nonforfeitable" merely upon the employee's fulfillment of conditions precedent, then §1053(a)(3) would be superfluous because it specifically provides that certain after-occurring events may legitimately reduce the benefits payable without rendering those benefits "forfeitable."[6] This section also illustrates the difference between "nonforfeitable" and "vested" because, as fully implemented, it expressly sanctions the forfeiture of certain vested benefits.

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[5] We wish to emphasize, nonetheless, the significance of the word "unconditional" and the extent of the distortion visited upon that ordinary term by the strained interpretation of the PBGC and the Court of Appeals. Had Congress intended "unconditional" to be limited to particular types of conditions, it could have so defined "unconditional" or have chosen other words to express such an extent. Since it did not do so, "unconditional" must be given its ordinary meaning. *E.g., NLRB v. Highland Park Mfg. Co., supra,* 341 U.S. at 324-25. *See also 62 Cases of Jam v. United States,* 340 U.S. 593, 599-600 (1951).

[6] Moreover, Congress plainly contemplated that certain conditions subsequent that were beyond the control of the plan participant, or which did not even directly involve a participant, would constitute forfeitures because it felt obliged to state that termination of benefits upon a participant's death did not make the benefits "forfeitable," §1053(a)(3)(A), and to authorize changes in benefits through limited retroactive plan amendments. *See* §1053(a)(3)(C).

The Seventh Circuit was preoccupied with the impression that the legislative history of ERISA had equated the terms "vested" and "nonforfeitable." The legislative history of §1053, however, states that "Under the conference substitute, *except as outlined below*, an employee's rights, once vested, are not to be forfeitable for any reason." Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 271 (1974), 1974 U.S. Code Cong. & Admin. News 5038, 5052. This passage directly confirms Congress' understanding that the terms were not synonymous because §1053 (a)(3) provided that some "vested" benefits could nonetheless be "forfeitable"—that is, not "nonforfeitable."

The question for this Court is not whether legislators used the terms interchangeably in their discussions or debates but whether *the statute* did so. It obviously did not. Congress provided insurance only for certain vested benefits under the terms of a plan. It did not supply this protection for *all* such benefits, however, but only for those that were *both* "vested" and "nonforfeitable."[7]

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[7] To the exent that some Senators or Representatives may have used the terms "vested" and "nonforfeitable" interchangeably, this use does not shed any light on the question before the Court because the legislators did not expressly address the narrow issue of whether the terms should be regarded as interchangeable during the interim period between the enactment of ERISA and the effective date of Titles I and II. Following the latter date, the terms are indeed virtually interchangeable because there are so few events that can lawfully constitute a forfeiture. Before that date, however, everyone agrees that the terms had very different significances. Statements by Congressmen or even committee reports using the terms in a general fashion can, and we submit must, be read as merely referring to the post-1976 period when all portions of ERISA were to be in operation. *Cf. Jewell Ridge Corp. v. Local 6167, UMW,* 325 U.S. 161, 168-69 (1945).

This Court's clarification of this issue is needed because several district courts have now subscribed to the Seventh Circuit's erroneous conclusion that any benefit vested under a plan during the interim period is "nonforfeitable." *See, e.g., Lear Sigler, Inc. v. Pension Benefit Guaranty Corporation,* Civil No. 77-1600, 238 BNA Pension Rptr. D-3, D-4 (E.D. Mich., April 20, 1979); *In re Williamsport Milk Products Co.,* Civil Action No. 76-1308, 206 BNA Pension Rptr. D-15, D-18 (M.D. Pa., August 30, 1978).

The reading of the statute by the Court of Appeals also embodies a significant error of syntax because the fulcrum of its holding is its perception that the adjective "unconditional" in § 1002(19) modifies "claim" rather than "benefit." The court has effectively rewritten §1002(19) by deleting the language which appears below in brackets:

> "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary [to that part of an immediate or deferred benefit under a pension plan] which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

The result of this unwarranted revision of the statute is to eliminate the requirement that the *part* of the benefit being claimed must be unconditional and legally enforceable against the plan. By construing these qualifications to modify "claim" rather than "benefit," the Seventh Circuit violated "one of the simplest canons of statutory construction" known as the "last antecedent rule." *See United States v. Hughes,* 116 F.2d 613, 616 (3d Cir. 1940). This rule dictates that:

> "Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and not to be construed as extending to others more remote." *United States v. Pritchett,* 470 F.2d 455, 459 (D.C. Cir. 1972).

Accord, People v. Consolidated Rail Corp., 589 F.2d 1327, 1332 (7th Cir. 1978); *National Surety Corp. v. Midland Bank,* 551 F.2d 21, 33-34 (3d Cir. 1977) *See* 2A Sands, STATUTES AND STATUTORY CONSTRUCTION § 47.33 (4th ed. 1973).

The proper grammatical analysis reveals that the three qualifying clauses in the definition modify "that part of an immediate or deferred benefit," rather than "claim." Thus properly read, the section is reasonably clear: Only that *part* of a *benefit* which (a) arises from service, (b) is unconditional, and (c) is legally enforceable against the plan is therefore declared to be "nonforfeitable." In the case of the Nachman and Concord Control plans, the only *part* of the benefit that is legally enforceable and unconditional is that part for which assets are already in the fund. Although the definition in § 1002(19) is hardly a model of English composition, this proper diagramming of its structure at least provides the coherence lacking in the Seventh Circuit's interpretation.

Finally, the Court of Appeals' view of the statutory definition of "nonforfeitable" contradicts the approach to the identical term by the Treasury Department in its regulations issued to enforce Title II of ERISA. In Treas. Reg. § 1.411(a)-4(a) (1977), the Department has announced that, "Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition." Treasury's interpretations in the form of regulations are universally accorded great weight and overruled only for solid reasons. *E.g., Commissioner v. South Texas Lumber Co.,* 333 U.S. 496, 501 (1948). In light of the structure of ERISA and the grammar of § 1002(19), there is no such "solid reason" here. It is inconceivable that the term "nonforfeitable" should have different meaning in Title I, imposing substantive obligations, than in Title II, amending the Internal Revenue Code to make compliance with those same obligations a condition of tax deductibility. Treasury's regulation thus points in the same direction as the other signposts which establish that the Concord Control and Nachman plans did not contain "nonforfeitable" benefits.

B. There Were No Benefits in Excess of Available Funds Guaranteed "Under the Terms of" the Nachman Plan.

The other important portion of § 1322(a) demonstrates that the statute continued the pre-ERISA rule that *the terms of a plan* were the measure of both the employees' rights (or claims)

and the employer's liability. In *Smith v. Union Carbide Corp.*, 350 F.2d 258, 261 (6th Cir. 1965), the court noted that under pre-ERISA law:

> "The only rights the plaintiff has to pension benefits arise out of the contract between the union and the defendant. He is not entitled to any pension benefits either in law or equity that are not given to him within the four corners of that instrument."

See also Finnell v. Cramet, Inc., 289 F.2d 409 (6th Cir. 1961); *United Steel Workers Local No. 2098 v. International Systems & Control Corp.*, 566 F.2d 1135 (10th Cir. 1977); *Craig v. Bemis Co.*, 517 F.2d 677, 680-81 (5th Cir. 1975). In particular, pre-ERISA law did not impose extracontractual obligations on an employer to fund all benefits provided under a pension plan and did not preclude the forfeiture of benefits, whether "vested" or not. Before ERISA, the only federal statutory references to "nonforfeitable" pension benefits appeared in former Sections 401(a)(7) and 401(d)(2) of the Internal Revenue Code of 1954. In each of those sections, the term was applied only to rights in specific, pre-existing assets. The Internal Revenue Service employed the term in a corresponding fashion and permitted plans to remain "qualified" for tax purposes despite the forfeiture of "vested" benefits. Rev. Rul. 69-421, 1969-2 Cum.Bull. 59, 78-9; *see also* pre-ERISA Treas. Reg. §1.401(b)-1(a) (2)(i) (1964).

In signing a pension plan such as those bargained for by Nachman and Concord Control with the UAW, all parties thereby agreed to an arrangement in which the employees' rights or claims to benefits were limited to the value of the plan's assets at the time of distribution, and the employer had no obligation to make any payments beyond the specified cents-per-hour-worked. There was no promise or reasonable expectation that benefits would exceed the assets available. *See Bianchin v. McGraw-Edison Co.*, 438 F.Supp. 585, 587-88 (W.D. Pa. 1976), *aff'd mem.*, 564 F.2d 89 (3d Cir. 1977). These legitimate, bargained-for limitations on the employer's liability and on the employees' claims to benefits prove beyond dispute that there were no "nonforfeitable benefits" *under the terms of such plans* beyond the value of those assets.

The only legislative history directed at the actual language of §1322(a) recognized that §1322(a) as enacted differs from the previous House and Senate bills because it restricts insurance coverage to benefits "guaranteed" by the plan. Conf. Rep. No. 93-1280, *supra* at 368, 1974 U.S. CODE CONG. & ADMIN. NEWS at 5147-48. This comment reconfirms that the statute as enacted represented a compromise between the House bill, which insured only those benefits required to be vested under Title I, and the Senate version. The compromise retained the focus on the plan's provisions, as contrasted with the House approach which tied Title IV to the future implementation of Title I, but it emphasized that covered benefits must truly be "guaranteed" by the plan.

This very analysis formed the nucleus of the rationale of *A-T-O, Inc. v. Pension Benefit Guaranty Corporation*, 456 F. Supp. 545 (N.D. Ohio 1978), *appeal docketed*, No. 78-3269 (6th Cir.). *A-T-O* involved a pension agreement where (a) contributions were to be made on a cents-per-hour-worked basis, (b) benefits were specifically conditioned on the sufficiency of assets in a pension trust, and (c) claims to benefits were enforceable against the plan only to the extent of those assets. *Id.* at 547. The court held that any benefits that could not be satisfied out of the assets upon termination of the plan (in November 1974, before Titles I and II were effective) were forfeitable and not subject to PBGC guarantee under Title IV. Referring to the Conference Committee Report discussed above, the court stated:

> "The quoted language clearly distinguishes between benefits that are 'vested' and those that are 'guaranteed by [the

provisions of the pre-ERISA pension plan agreement],' because the obvious converse of the quoted language is that benefits could be vested without being guaranteed by the pension plan. A fair reading of the Congressional intent in the noted insurance coverage discussion is that upon the prospective imposition of the minimum vesting and funding provisions of Title I, the benefits guaranteed under Title IV would automatically be elevated to the same levels as provided in Title I; however, *insurance coverage for benefits accrued prior to the enactment of ERISA would be determined by the provisions of the individual pension plan.*" *Id.* at 553.

In the instant case, the Seventh Circuit reached a different inference from the legislative history because it deemed this analysis to over-emphasize the word "guarantee." 592 F.2d at 954 n.9. That result, however, bestows no weight whatsoever on this crucial word of "ordinary" English, fails to afford adequate consideration to the competing policies and pressures that accounted for the final form of ERISA, and thereby disregards the admonition of *United States v. Sisson*, 399 U.S. 267, 298 (1970), that:

> "Care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy, especially when the boundaries of a statute are drawn as a compromise resulting from the counter-vailing pressures of other policies."

It also contravenes the pointed analysis that:

> "The conflicting purposes of Title IV argue against any interpretation of the Act to assert employer liability which the statute does not clearly and directly impose." Note, *Termination Liability Under Title IV of ERISA: Impact on Companies Under Common Control*, 27 CASE W. RES. L. REV. 945, 963 (1977).

The extent of the Seventh Circuit's statutory misadventure is highlighted by *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), which the Seventh Circuit ironically cited for guidance in concluding that it would be erroneous to read "technical pension language as if it were ordinary English speech." See 592 F.2d at 953, *quoting Riley v. MEBA Pension Trust*, 570 F.2d at 408-09.[8] *Riley* actually confirms the necessity of (i) a common sense approach to the issue of forfeiture, (ii) a strict attention to the terms of the particular plan, and (iii) a scrupulous fidelity to the delayed effective dates of Titles I and II. It thereby supports the conclusion that a plan such as Nachman's does not contain "nonforfeitable benefits."

The *Riley* plan, unlike the Nachman and Concord Control plans, continued into 1976 and accordingly became subject to the vesting and funding rules of Titles I and II of ERISA. The plaintiff was denied benefits under a rather ambiguous condition in the plan which was construed by the plan trustees to cut off benefits because he went to work for the federal government. The Second Circuit held that this restriction on his ability to collect benefits made his claim legally unenforceable against the plan *and thus constituted a forfeiture within the meaning of ERISA*. Because the vesting requirements of 29 U.S.C. §1053 had become applicable to *that* plan, however, this attempted forfeiture was ineffective. *Id.* at 409.

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[8] There is no indication in *Riley* that Judge Friendly meant to repudiate the principle that Congress is assumed to have used words in their ordinary meaning. Judge Friendly's remark was made to support the rejection of a strained argument that an indefinite suspension of benefits was not a forfeiture, and it thus offers scant comfort for the PBGC's effort to convert a permanent cut-off of benefits occurring when there are insufficient assets upon termination into something less than a "forfeiture." To the extent that the PBGC may invoke Judge Friendly's remark as evidence of its would-be special expertise in "pension English," its suggestion should be taken with an ample dosage of salt. "Pension English," like ordinary English, has been a subject of *judicial* inquiry and analysis for decades. Surely this Court's (and Congress') understanding of the mother tongue is at least equal to that of a fledgling federal bureau.

Significantly, the Second Circuit's analysis was different for benefits payable before January 1, 1976. The court stated, *l.c.* 412, that "Riley's entitlement to monthly payments prior to that date depends on [other] principles of law," and affirmed the district court's conclusion that Riley's 1975 benefits were properly forfeited ***under the terms of the pension plan.*** As applied to the Concord Control and Nachman plans, which admittedly were never subject to Section 1053, ***Riley*** thus established that restrictions in a plan limiting ***payment*** of claims (but not necessarily "entitlement" to them) make the benefits forfeitable and thus beyond the reach of the PBGC with respect to pre-1976 plan years.

II. The PBGC's Attempt to Guarantee Benefits Beyond the Value of the Nachman Plan's Assets Is Inconsistent With the Delayed Effective Dates of Other Parts of ERISA.

In adopting ERISA, Congress did not purport to effect an overnight transformation of all aspects of pension law. Title IV of ERISA, containing the plan termination insurance program, became effective on September 2, 1974. The bulk of the statute, however, provided for staggered effective dates. Most particularly, Title I (which regulated participation and vesting and required minimum funding of pension plans) and Title II (which incorporated the requirements of Title I as conditions to tax-free treatment of trusts and current tax deductibility of employer contributions) were given a separate starting time. For plans in existence on January 1, 1974, these vesting and funding provisions of ERISA became effective only for "plan years" beginning *after* December 31, 1975. 29 U.S.C. §§ 1061(b), 1086(b).[9]

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[9] The issue posed by this case is not the only ERISA issue that requires careful recognition of the delayed effective date of Title I. In *Riley v. MEBA Pension Trust, supra,* the Second Circuit made short shrift of a claim that the vesting provisions of Title I should be used to develop a federal common law applicable to periods before their effective date:

> ". . . care must be taken not to subvert the intention of Congress to postpone the effective date of the vesting provisions in order to afford a fair opportunity to bring plans and their application in line with the new vesting requirements." 570 F.2d at 413.

See also Schlansky v. United Merchants & Manufacturers, Inc., 443 F.Supp. 1054, 1064 (S.D. N.Y. 1977); *Keller v. Graphic Systems of Akron, Inc.*, 422 F.Supp. 1005, 1014 (N.D. Ohio 1976).

The Concord Control and Nachman plans provided for "forfeitures" because the rights of beneficiaries were confined to those funds on hand at termination. The issue directly presented here, however, is ***not*** whether those forfeiture provisions were valid or invalid. If that were the question, the forfeitures would be upheld because the provisions of ERISA prohibiting such forfeitures did not become effective until after these plans had terminated. Yet here the PBGC is trying to bootstrap itself indirectly into a position that it could never achieve directly. By seeking jurisdiction over these plans under the guarantee provisions of Title IV and asserting liability of astronomical proportions, the PBGC is effectively asking this Court to hold that the forfeiture provisions of the plans are in fact invalid and that it is entitled to enforce liability far beyond the contemplation of Congress or the parties thereto. This is a flagrant usurpation of authority and a dramatic reconstruction of the entire statutory scheme.

A proper understanding of the PBGC's authority must begin with the teaching of *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1972):

> "It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose."

The statute must be interpreted with reference to its entire text and without undue focus on a single sentence or portion.

See Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); *Richards v. United States, supra*, 369 U.S. at 11.

An analysis of the complete statute compels the conclusion that plans such as these did not contain benefits subject to PBGC guarantee beyond the value of their assets at termination. Any other result would not only be inconsistent with the plan for gradual statutory implementation, which postpones imposition of the new vesting and funding requirements until plan years beginning in 1976, but would also in large part negate 29 U.S.C. § 1053(a). That section requires plans to be amended as of January 1, 1976, to provide that benefits cannot be forfeited except in certain narrowly circumscribed situations. Yet if plans such as these, which the Court of Appeals acknowledged to be common before the passage of ERISA, already contained PBGC-guaranteed benefits notwithstanding their explicit language limiting benefits to the value of their assets, there would be no reason for § 1053 to require plan amendments. Title IV would have already effectively imposed those amendments. By failing to devote adequate attention to the statute as a whole and the relationship between its component parts, the Seventh Circuit violated the precept that a statute will not be interpreted to render a provision inoperative, redundant or essentially superfluous. *Colautti v. Franklin*, — U.S. —, 47 U.S.L.W. 4094, 4098 (Jan. 9, 1979); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *Ruiz v. Morton*, 462 F.2d 818, 820 (9th Cir. 1972), *aff'd*, 415 U.S. 199 (1974).

The need to interpret Title IV so as to avoid abrogating the delayed effective date of Titles I and II is also buttressed by the stated Congressional desire that these portions of ERISA should operate harmoniously. "The termination insurance program is intended to work hand-in-hand with the minimum funding standards imposed by the bill . . ." S.Rep. No. 93-383, 93d Cong., 2d Sess. 25 (1974), 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4911. The Seventh Circuit's analysis severs this

complementary relationship by overextending Title IV in disregard of the delayed effective date of Titles I and II with respect to the otherwise "forfeitable" benefits of the Nachman and Concord Control plans.

This Court on several occasions has acknowledged the step-by-step program of implementation built into ERISA by Congress. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 n.23 (1978), the Court differentiated ERISA from the Minnesota statute there in question by stating:

> "Compare the gradual applicability of ERISA, which itself is not even mandatory. At the outset ERISA did not go into effect at all until four months after it was enacted. 29 U.S.C § 1144 (1976 ed.). Funding and vesting requirements were delayed for an additional year."

In *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 721-22 n.40 (1978), the Court observed:

> "In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. In that year, Congress passed a bill regulating employee retirement programs. Employee Retirement Income Security Act of 1974, 88 Stat. 829. The bill paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted."

See also Malone v. White Motor Corp., 435 U.S. 497, 499 n.1 (1978). Having recognized and sought to alleviate the enormous economic burdens of the new law by postponing the effective date of Titles I and II, Congress could not have meant to allow the PBGC by administrative fiat to impose the same financial millstone on plans lawfully terminated before the 1976 effective date of ERISA's vesting and funding requirements. The

Nachman case thus requires the Court to address this issue directly and to give real meaning to its earlier observations.

Contrary to the opinion expressed by the Seventh Circuit. a proper statutory reconciliation gave Title IV a limited but appropriate effect during the period before January 1, 1976. Before the vesting and funding standards of Titles I and II became effective, the PBGC's authority to guarantee benefits was limited to benefits for which the plan had assets on hand only if the particular plan in question tied forfeitability to asset insufficiency. All that the PBGC was precluded from doing is precisely what it seeks to do here—to pay benefits that were truly forfeitable under the terms of the governing plan and then subsequently to assert employer liability for those amounts The proper statutory reconciliation does not mean that the PBGC insured benefits vested only by virtue of Title I, but it does mean that the terms of a plan controlled until Title I amendments became mandatory for plans in existence before ERISA was enacted.

III. The PBGC Regulation Defining "Nonforfeitable" Is Invalid and Is Not Entitled to Deference in Interpreting Section 1322(a).

In part III of its opinion, the Court of Appeals held that the PBGC definition of "nonforfeitable" in 29 C.F.R. § 2605.6(a) is consistent with the definition of that term found in 29 U.S.C. § 1002(19). The key provision of this would-be regulation specifies that benefits are "nonforfeitable" once "the participant . . . has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit. . . ."[10]

[10] 29 C.F.R. §2605.6(a) provides in full:

"(a) For the purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death."

At least with respect to the interim period from September 2, 1974, through January 1, 1976—before the minimum funding and vesting provisions of ERISA were fully implemented—the Seventh Circuit's acceptance of the PBGC definition was fundamentally unsound. This regulation is unauthorized, arbitrary, and inconsistent with the language of ERISA. It should not be followed either as substantive law or as a guide to interpreting the controlling statute.

At the threshold, the Court of Appeals failed to recognize that the PBGC definition departs significantly from both the clear meaning of "nonforfeitable" as defined in Title I and the context in which that term appears in § 1322(a). This regulation does not comport with the statutory definition because § 1002 (19) recognizes the terms of the plan as the source of the "enforceability" of rights and as the touchstone for a determination of nonforfeitability. The PBGC definition, on the other hand, totally ignores this crucial factor in assessing nonforfeitability. The regulation (and the Court of Appeals' analysis thereof) also errs by failing to consider the structure of § 1322(a), which likewise requires attention to the "terms of a plan" for identification of those nonforfeitable benefits which are to be guaranteed by the PBGC.

In assaying the PBGC regulation, the Court should be guided by its analysis last Term in *Southeastern Community College v. Davis*, — U.S. —, 47 U.S.L.W. 4689, 4692-93 (June 11, 1979). There the respondent claimed that certain federal regulations required the petitioner to undertake affirmative action to accommodate handicapped persons. Based on the language

and structure of the controlling federal statute, the Court concluded that the regulations did not require such action and that, if they did, they were unauthorized:

> "Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of §504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute." *Id.* at 4692.

The PBGC regulation must be approached with equal caution because the expansive interpretation of the Seventh Circuit produces unauthorized and unreasonable consequences.

A. The PBGC Regulation Purports to Affect Substantive Rights but Lacks Statutory Authorization.

The PBGC regulation can be given binding effect during the interim period before January 1, 1976, *only if* the PBGC has been granted authority by Congress, and has exercised that authority, to "create" a special definition of "nonforfeitable" for purposes of Title IV of ERISA.[11] Only by virtue of such authority could the PBGC expand the statute to guarantee benefits which would otherwise be forfeitable during the interim period. This is particularly true where, as in the case of Concord Control, for example, the Company may be exposed to a liability in excess of $700,000.

[11] The PBGC has so characterized its action before the Courts of Appeals in both the *Nachman* and *Concord Control* cases.

The PBGC purported to adopt the regulation under 29 U.S.C. §§1322(a) and 1302(b)(3).[12] This Court's unanimous opinion in *Chrysler Corp. v. Brown*, — U.S. —, 47 U.S. L.W. 4434 (April 18, 1979), makes it clear that while the regulation purports to be substantive in nature, it lacks the necessary and appropriate statutory underpinnings. The PBGC definition in 29 C.F.R. § 2605.6(a) flunks the first and foremost of the three tests for substantive agency rule-making established by *Chrysler* because there is no "nexus between the regulations and some delegation of requisite legislative authority by Congress." 47 U.S.L.W. at 4440.

As previously noted, § 1322(a) permits the PBGC only to guarantee "nonforfeitable benefits . . . under the terms of a plan." No quantum of liberality in construction can produce even an inference that this provision empowers the PBGC to classify benefits as "nonforfeitable," much less to depart from the general meaning of the term as defined in Title I of ERISA.

The second source cited by the PBGC in support of its rule-making power is §1302(b)(3), which gives the PBGC the authority:

> "[T]o adopt, amend, and repeal, by the board of directors, bylaws, rules and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this Act."

Although there is no question that this provision grants rule-making authority, it is equally apparent that it cannot be construed as a broad delegation of legislative power. It is no more than a general grant of housekeeping authority to the PBGC to arrange its affairs and to exercise those powers that have otherwise been conferred upon it. As such, it is parallel in its

[12] *See* 40 Fed. Reg. 24206 (June 5, 1975), and 40 Fed. Reg. 43509 (Sept. 22, 1975).

terms and function to 5 U.S.C. § 301, which this Court in *Chrysler* held did not authorize "substantive rules." *See* 47 U.S.L.W. at 4442-43.

In short, Congress did not grant the PBGC any express authority to expand the scope of its jurisdiction by creating a special Title IV definition of nonforfeitable basic benefits.[13] *Compare National Broadcasting Co. v. United States,* 319 U.S. 190, 217-19 (1943). This glaring absence is entitled to great

[13] Although Congress did provide in §1322(c) that the PBGC should have authority to provide for the guarantee of "other classes of benefits . . . as it determines to be appropriate," the PBGC cannot invoke this provision as a basis for the instant regulation for several reasons. First, Congress intended that this authority be exercised to guarantee "nonbasic" benefits, *i.e.,* annuities in excess of $750 per month, medical benefits, and the like. Conf. Rep. No. 93-1280, *supra* at 368, 1974 U.S. CODE CONG. & ADMIN. NEWS at 5148. The benefits at issue in this case are basic retirement benefits and thus do not fall within the class of benefits referred to by Congress in enacting §1322(c).

Secondly, the PBGC cannot rest the current regulation on §1322 (c) because the Notice of Proposed Rulemaking limited its effect and impact to nonforfeitable benefits by specifically providing that the purpose of the regulation was "to describe those benefits guaranteed under Section 4022(a) of the Act." 40 Fed.Reg. 24206, 24209 (June 5, 1975). The purpose clause was not changed in this respect in the final rule, 40 Fed.Reg. 43509, 43510 (Sept. 22, 1975), and it was not affected by the 1978 amendment to the regulation. *See* 29 C.F.R. §§2605.1(a) and 2605.3(a).

Finally, and most basically, the PBGC cannot rely on §1322(c) because its Notice of Proposed Rulemaking did not cite that statute. Any regulation based on §1322(c) would be deficient under the third *Chrysler* criterion relating to compliance with procedural requirements. The applicable procedural statute in this case, as in *Chrysler,* is 5 U.S.C. §553 (the Administrative Procedure Act), and a regulation based on §1322(c) would not comply with the requirement of 5 U.S.C. §553(b)(2) that the notice of proposed rulemaking include reference to the legal authority for the rule. *See also Morton v. Ruiz,* 415 U.S. 199, 235 (1974). There is not even an indirect indication in the Notice of Proposed Rulemaking or elsewhere that the PBGC was attempting to define §1322(c) benefits, and none of the comments received by PBGC addressed this issue. *See* 40 Fed.Reg. at 43509-10.

weight because of the potentially cataclysmic financial effect on the employer and the serious constitutional problems thus spawned. Moreover, an analysis of the structure of ERISA and its legislative history confirms that Congress did not confer general quasi-legislative authority on the PBGC. There is no indication that Congress intended the PBGC to become involved in reviewing, approving, or acting with respect to plans to determine whether they provided forfeitable or nonforfeitable benefits. This function was delegated by Congress to the Secretary of the Treasury in § 1012 of ERISA, 26 U.S.C. § 411, and not to the PBGC.[14]

B. The PBGC Regulation Is Not Entitled to Deference in Interpreting Section 1322(a).

The deference to which a pronouncement of an administrative agency is entitled varies greatly depending on the circumstances. As the Court recently stated in *National Muffler Dealers Ass'n. v. United States,* — U.S. —, 47 U.S.L.W. 4277, 4278 (Mar. 20, 1979):

> "In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. . . . Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the [agency's] interpretation and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute."

[14] Section 1012 of ERISA amended the Internal Revenue Code of 1954 by, *inter alia,* adding §411. Under §411 of the Code, a pension trust will not qualify under §401(a) of the Code unless it provides "nonforfeitable" benefits. The Secretary of the Treasury is responsible for §401(a) qualification determinations.

In this case, the PBGC regulation is arbitrary, unreasonable, unpersuasive and certainly does not merit any deference in interpreting the statute.[15]

The determination of the meaning of §1322(a) is peculiarly a judicial function because it involves the scope of PBGC jurisdiction. As stated in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), "[a]n agency may not finally decide the limits of its statutory power." In *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973), the Court reiterated the observation that: ". . . an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."

The meaning of "nonforfeitable" in §1322(a) is, of course, also an issue of statutory construction. The Court has repeatedly observed that:

> ". . . the courts are the final authorities on issues of statutory construction . . . and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' "

SEC v. Sloan, 436 U.S. 103, 118 (1978), *quoting NLRB v. Brown*, 380 U.S. 278, 291 (1965). The PBGC regulation is

[15] It should be noted that the Seventh Circuit, while finding the PBGC regulation to be consistent with the statute, did not expressly accord the PBGC any deference in that statutory interpretation process. In *A-T-O, Inc. v. Pension Benefit Guaranty Corporation, supra*, the court specifically considered and rejected the deference argument. *See* 456 F.Supp. at 550-51 & 554. We recognize that some courts have upheld a PBGC claim to deference. *See Connolly v. Pension Benefit Guaranty Corporation*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, — U.S. —, 47 U.S.L.W. 3571 (Feb. 26, 1979); *In re Williamsport Milk Products Co., supra*. There is no indication that these latter cases considered the multitude of relevant factors precluding deference, however, and they are therefore unpersuasive.

inconsistent with the statutory definition of "nonforfeitable" and the Congressional schedule for gradual nullification of contractual language such as that contained in the Nachman and Concord Control plans. In this sense there are powerful indications that the PBGC regulation is contrary to the Congressional purpose and flatly wrong. *See Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *Dobbs v. Costle*, 559 F.2d 946, 948 (5th Cir. 1977); *Ass'n. of American Railroads v. Costle*, 562 F.2d 1310, 1318-19 (D.C. Cir. 1977). In the pension plan context, this Court recently rejected an interpretation of the Securities and Exchange Act by the SEC, stating:

> ". . . deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history."

International Brotherhood of Teamsters v. Daniel, supra, 47 U.S.L.W. at 4138 n.20. *Accord, Southeastern Community College v. Davis, supra*, 47 U.S.L.W. at 4692.

Recognition of the kind of statutory interpretation involved in the PBGC regulation produces additional reasons why it is not entitled to any weight. Deference to an agency is appropriate only when the relevant statute is unclear or susceptible of differing interpretations. *E.g., Shea v. Vialpando*, 416 U.S. 251, 262 n.11 (1974); *Green v. Ten Eyck*, 572 F.2d 1233, 1241 (8th Cir. 1978). Here, §1322(a) is unequivocal, and as discussed above in Part I of this brief, the PBGC's regulation is antithetical to its plain meaning. Furthermore, the PBGC is not entitled to deference because it has not relied on any technical expertise or experience in this area. When an agency invokes the tools of legal analysis to reach its decision, rather than calling on its technical sophistication, the resulting decision is not entitled to any particular esteem. *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960); *Jicarilla Apache Tribe v. Federal Energy Regulatory Comm'n.*,

578 F.2d 289, 292-93 (10th Cir. 1978); *Lubrizol Corp. v. Environmental Protection Agency*, 562 F.2d 807, 816-17 n.23 (D.C. Cir. 1977). As the Court stated in *Barlow v. Collins*, 397 U.S. 159, 166 (1970):

> "On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction."

The PBGC regulation is equally deficient under the other criteria identified in *National Muffler Dealers Ass'n. v. United States, supra*. This interpretation is certainly not of long-standing duration, having only been promulgated on September 22, 1975.[16] In addition to its obvious incompatibility with the statute, the regulation is also at war with other pronouncements of the PBGC. It purports to define a "nonforfeitable" benefit as one in which the participant or beneficiary has satisfied all the conditions to establish "entitlement to a benefit" except for certain specified acts or events. But since those same acts or events are taken into consideration in defining "entitlement to a benefit" in 29 C.F.R. §§2605.5(a)(3) through (5), the definition in §2605.6(a) is on its face a futile exercise in tail-chasing.

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[16] In fact, as applied to Concord Control, the PBGC regulation is not entitled to any consideration whatsoever because its application creates a problem of *double* retroactivity. In addition to being retroactive because it imposes a liability attributable to the unfunded grant of past service credits that took place when the Concord Control plan was initiated in 1956, the regulation is further retroactive because it was not adopted until after that plan was terminated on April 1, 1975. This aspect of compound retroactivity was specified by the court in *A-T-O v. Pension Benefit Guaranty Corporation, supra*, 456 F.Supp. at 554, as a reason not to accept the PBGC regulation. *See also Phillips Petroleum Co. v. Department of Energy*, 449 F.Supp. 760, 797-98 (D. Del. 1978).

To the extent that the PBGC regulation represents a refusal to apply the Title I definition of "nonforfeitable" to Title IV, it also constitutes a departure from the practice engaged in by the PBGC in its own opinion letters of utilizing Title I definitions in matters arising under Title IV.[17] As noted in *National Muffler Dealers Ass'n.*, such internal inconsistency militates strongly against acceptance of the PBGC's present position. *See also Morton v. Ruiz, supra*, 415 U.S. at 237; *Asarco, Inc. v. Environmental Protection Agency*, 578 F.2d 319, 328 (D.C. Cir. 1978).[18] And since the PBGC did not participate in drafting ERISA and there has been no subsequent Congressional action ratifying the agency interpretation, the last factors mentioned in *National Muffler Dealers Ass'n.* also sharply limit the persuasiveness of the regulation. *See generally Zuber v. Allen*, 396 U.S. 168 (1969).

Besides the criteria identified in *National Muffler Dealers Ass'n.*, two other aspects of the regulation vitiate the PBGC's claim to infallibility. The weight accorded to an administrative determination depends in part on the thoroughness evident in

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[17] For example, Letter 75-3 (April 18, 1976) incorporates the definition of "participant" from Section 3(7) of Title I to explain the scope of Title IV's requirements for payment of termination insurance premiums. Similarly, the PBGC uses the definition of "plan year" set forth in §3(39) of Title I to set the date on which Title IV premiums must be paid (Letter 75-101, August 8, 1975). The terms "participant" and "plan year" are used throughout ERISA, although their definitions are limited on their face to Title I. Thus, the PBGC apparently adopts Title I definitions for use in Title IV when that suits its purposes, but at the same time asks this Court to sanction a departure from that practice with respect to the crucial term "nonforfeitable."

[18] As pointed out above in Part IA, the PBGC Regulation is also inconsistent with the Treasury Department regulation on the meaning of "nonforfeitable." As the senior agency, with a background of experience in promulgating regulations under the Internal Revenue Code (some of which dealt with "nonforfeitable" pension benefits), the Treasury interpretation is clearly entitled to greater credence than the contradictory PBGC regulation. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 144-45 (1976).

its consideration. *E.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The PBGC regulation is woefully deficient when measured by this criterion. Neither the PBGC's Notice of Proposed Rulemaking, 40 Fed. Reg. 24206 (June 5, 1975), nor its notice promulgating the regulation, 40 Fed. Reg. 43509 (Sept. 22, 1975), gave any indication of the agency's reasons for concluding either that (a) Congress intended it to have the power to define "nonforfeitable," or (b) its definition could be deemed consistent with the statutory language and purpose. Such unenlightening administrative action is not entitled to deference because:

> "Since this Court can only speculate as to [its] reasons for reaching that conclusion, the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority."

Adamo Wrecking Co. v. United States, 434 U.S. 275, 288 n.5 (1978); *SEC v. Sloan, supra*, 436 U.S. at 117-18.

Finally, the fact that the regulation defining "nonforfeitable" lacks the requisite statutory authority required for substantive rulemaking also undermines the compulsion of the PBGC's analysis. In *General Electric Co. v. Gilbert, supra*, 429 U.S. at 141, the Court discounted the effect of a guideline issued by the Equal Employment Opportunity Commission (which also has only limited regulatory authority) by observing:

> ". . . courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law . . . or to regulations which under the enabling statute may themselves supply the basis for imposition of liability. . . ."

In sum, a variety of factors compel judicial disapproval of the PBGC's attempt to arrogate legislative power and to rewrite the statutory language to expand its own jurisdiction.

CONCLUSION

For the reasons stated above and in the brief filed by petitioner Nachman Corporation, the judgment of the Court of Appeals should be reversed and the cause remanded for reinstatement of the judgment entered by the district court.

Respectfully submitted,

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